29 30

[ ]

Wm Innes
January 15. 1770.

Unto the Right Honourable the Lords of Council and Session,

17th Jan 1771
Sec
14th Feb 1771.
Grd. & respond. on a plea of want of title in pursuer to crave the warrandice on behalf
Pitsligo. Dangerous to encourage such actions to be allowed.
Pr. & case of Stewart & Hall in short & seem in point
Ld Kaims. & in respect of urgency refusing a declarator of Marriage, find expedy Dilo.

THE PETITION

OF

WILLIAM INNES Merchant in London,

Humbly Sheweth,

THAT James Scott merchant in Edinburgh, had been in use for some years to correspond with the petitioner. The petitioner was the person upon whom he chiefly did draw in making payments at London; and Mr Scott did from time to time make remittances to the petitioner for answering these draughts, or for reimbursing him when the petitioner was in advance; which very frequently was the case.

Mr Scott, in the course of his dealings, did likewise correspond sometimes with Messrs Annan and Colquhoun merchants in London.

In the course of this correspondence, Mr Scott was, in the beginning of December 1769, debtor to the petitioner for about L. 2000 Sterling.

Of this date, Mr Scott drew upon Annan and Colquhoun for L. 800 Sterling, in four bills, all at 60 days date; two whereof, for L. 300 Sterling each, payable to the order of Messrs Gibson and Balfour; the third, for L. 100 Sterling, to the order of James Seton; and the fourth, also for L. 100, to the order of Andrew Sinclair,

Dec. 13. 1769.

A

Dec. 12. 1769. Sinclair. And Mr Scott, of ſame date, wrote to the petitioner the following letter: "Dear Sir, by diſappointment of remittances "from Mr Ebenezer M'Culloch and company, I have ſome rea- "ſon to fear that Meſſrs Annan and Colquhoun may be obliged "to ſtop payment, unleſs Mr Annan, now here, can obtain "the ſecurities he is labouring to get, viz. Lord Dum- "fries and George Young. I was ſo unlucky, as this day, "before I heard of any demur in their affairs, to draw on Meſſrs "Annan and Colquhoun for L. 800 in four bills, as under, viz.

"To order, Meſſrs Gibſon and Balfour, at 60 days,	L.	300	0 0
"To order of the ſame, at 60 days,		300	0 0
"To order of James Seton, at 60 days,		100	0 0
"To order of Andrew Sinclair, Eſq; at 60 days,		100	0 0
	L.	800	0 0

"I ſend you incloſed Meſſrs Johnſton and Smith's bill, 40 days, "on Glynn and company, for L. 800. If they accept my bills "and are going on, I beg you will put them in poſſeſſion of this "L. 800 bill; if not, I have directed Mr Colquhoun to ſend "them to your good ſelf, if the holders will take that trouble, "and I beg you will accept them for my honour. I have alſo "deſired they will ſend to you any other bills of mine running "on them, to you for payment, *which I ſhall make proviſion for*, as "I ſhould not wiſh they returned here. The poſt hurries me, ſo "I have only time to add, that I am, &c."

To this letter, which arrived at London on the 16th December, the petitioner by that night's poſt returned the following anſwer.

Dec. 16. 1769. "Mr James Scott, I wrote you the 11th, and have your fa- "vour of the 12th inſt. and am ſorry for what you write about "your fears regarding Annan and company, in caſe they do not "get ſome ſecurities and aſſiſtance. I notice you had drawn on "them to Gibſon and company, 60 days date, L. 600; to James "Seton L. 100, and to A. Sinclair L. 100; L. 200 which you "deſire I may accept for your honour, which I ſhall do if neceſ- "ſary; and I have Johnſton and company's bill on Glynn and "company, due January 24th, L. 800 to your credit. I ſee you

deſire

desire I may give Annan and company said bill if they are going on, *at which I shall consider*. I was out of town to day, and have not seen them, nor heard of them. I notice you also desire I may pay other draughts of yours on A. and C. and I shall inquire what there is of them. You have a good deal to remit me soon, and I hope you'll not delay, money being useful during the winter. I am, &c."

Of this date, Mr Scott wrote a second letter to the petitioner in these words: "I wrote you last post just as the post was going, and I hope you'll excuse the hurry I was in. My letter inclosed you Johnston and Smith's bill on Glynn and Halifax, for L. 800, at 40 days date, which you will please (if Messrs Annan and Colquhoun are going on,) deliver to them; *and if not, you will be so good as credit my accompt for same*, and accept for honour two bills I drew same date, to Messrs Gibson and Balfour, of L. 300 each, at 60 days date; one bill to order of James Seton, at 60 days date, for L. 100 Sterling; and one bill to order of Andrew Sinclair, Esq; at 60 days date, for L. 100, in all L. 800; the holders whereof, Messrs Annan and company, will inform you of, or Messrs Gibson and Balfour, Mr James Seton, and Mr Andrew Sinclair, will direct their correspondents to call on you with them, as I have applied them to that purpose. If this stop happens, as I doubt not it will, it is owing to Ebenezer M'Culloch and company not remitting, for retiring bills drawn on A. and C. to a large amount, on account of their not being able to pass their bills here, by reason of the large quantity of them in the circle, and a great stock of linen goods on their hands; though it is thought here, that by next post they will get such a supply by the credit of their friends from the New or Ayr bank, and the other banks, in bills, as might have prevented all the mischief; and a house in town would have assisted them till they had reduced the circulation to a small matter which they could have managed. This night I hear, Messrs M'Culloch and Young's friends are meeting again, to try what can be done to mend things. As I have sundry bills on Messrs Annan and Colquhoun now running unaccepted, my friends, Messrs Gibson and Balfour, propose to lend me their assistance on this occasion, and say, if you will retire my bills as they come due, and accept my draughts to their order, and write them a letter Dec. 14. 1769.

"letter to that purpoſe in courſe of poſt; and that you will do "ſo, they will aſſiſt and enable me to ſupply you with good remit- "tances, to keep you fully remitted until I can get matters eaſy, "which will be by the term of Whitſunday next, in a progreſſive "way. In hopes of hearing from you in courſe, I am, &c.

"Pleaſe to negotiate the incloſed bill on John Bright of Bri- "ſtol, and credit my accompt for the amount when in caſh, be- "ing L. 57: 12: 3."

By courſe of poſt, this letter arrived at London on the 18th December; and that day the petitioner returned the following
Dec. 18. 1769. anſwer thereto." Mr James Scott, Dear Sir, I wrote you laſt poſt, "and have your favour the 14th inſtant. I find that Meſſrs An- "nan and company are ſtopt; ſo I have placed the L. 800 on "Glynn and company to your credit; beſides which, you have "to remit me about L. 300 more this week, and ſhall expect it. "I wonder you have not ſent me a liſt of the bills on Annan and "company, which you deſire I may pay for your honour; but "I have got a liſt of thoſe due up to 31ſt January, amount "L. 4151: 13: 4, beſides what are due in February, which, in "the hurry, their clerk could not give. The L. 800 you drew "on them laſt poſt, muſt be added to the liſt, being altogether "a ſum I cannot undertake; which I am extremely ſorry for. I "ſpoke to Meſſrs Hogg and Kinloch at 'Change, and aſked them "to aſſiſt in the payment of your bills; but they told me, they "do not correſpond with you, which is news to me alſo: I "thought they did. I notice that Meſſrs Gibſon and company "would aſſiſt you on my indemnity, and I thank them; but the "Scots circulation is come into ſuch diſgrace, that it would be "too dangerous for me to go on with it; and it will be very "troubleſome to me, if you do not remit me duly for the bills "running. I make them about L. 1200. I have your draught on "Bright, Briſtol, at 30 days, L. 57: 12: 3 to your credit. I wiſh "that Ebenezer M'Culloch and company may be able to retrieve "theſe alarming affairs; but little elſe than abſolute caſh will do "it here, as Scots bills are grown a deal too numerous. I "am, &c."

"Your laſt made me expect remittance for the two bills on "Annan and company, which were due the 16th; and it looks "odd you have not complied."

It

It appears from the excerpts produced by Meſſrs Gibſon and Balfour, that they, of this date, wrote to Meſſrs Biggar and Hamilton their correſpondents at London in theſe words, "Yeſter- Dec. 14. 1769.
"day Ebenezer M'Culloch and company, of this place, ſtopt
"payment; we have the pleaſure to adviſe you, that we have not
"the leaſt connection with them, as the conſequences of this
"failure may perhaps prevent Annan and Colquhoun from ac-
"cepting our laſt remittance to you, you will in that caſe preſent
"it to William Innes, who will accept it for honour of the draw-
"er. If he does not, you'll ſend us a proteſt for non-acceptance,
"and keep the bill till further orders."

Biggar and Hamilton, it appears, returned the following anſwer in courſe of poſt: "We wrote you the 11th inſtant, and Dec. 18.
"have now before your favours of the 12th and 14th December; 1769.
"the firſt incloſed James Scott on Annan and Colquhoun
"L. 300. We hope to be able to acquaint you of the fate of
"Annan and Colquhoun's bill this evening; but we have al-
"ready ſent ſeveral times to their houſe without finding them."

"*P. S.* We have ſent repeatedly again to Annan and Col-
"quhoun, but without getting the bill; however, we ſhall take
"care to execute your directions to-morrow."

Biggar and Hamilton the next poſt, do again write to Gibſon and Balfour as follows: "We ſent as early as poſſible to Annan Dec. 19.
"and Colquhoun's this morning, and had J. Scott's bill on them 1769.
"*per* L. 300 returned not accepted. It was immediately diſ-
"patched to Mr Innes, who refuſed to have any thing to do with
"it; and we were at the ſame time informed, we believe from
"pretty good authority, that James Scott's draughts on that gen-
"tleman, to between L. 3000 and L. 4000, have been returned
"for want of acceptance. According to your directions, we have
"incloſed you a proteſt for non-acceptance."

It appears, that Meſſrs Gibſon and Balfour had tranſmitted Mr Scott's other draught for L. 300 on Annan and Colquhoun to another houſe in London, *viz.* that of Bogle and Scott.

For of this date, Gibſon and Balfour wrote Bogle and Scott: Dec. 14.
"Should a remittance on our laſt *per* L. 300 on Annan and 1769.
"Colquhoun be refuſed acceptance, you will preſent it to Wil-

" liam Innes for honour of the drawer; and if he don't accept
" it, tranſmit us a proteſt thereon for non-acceptance."

Dec. 18. 1769. Of this date, Bogle and Scott return an anſwer to Gibſon and Balfour, bearing, that they would apply to the petitioner for acceptance of James Scott's bill on Annan and Colquhoun; and of

Dec. 19. this date, they again wrote Meſſrs Gibſon and Balfour: "We
" have at preſent to incloſe you proteſt for non-acceptance of
" James Scott's bill on Annan and Colquhoun: We applied to
" Mr William Innes, who does not chuſe to accept it, from his
" manner of ſpeaking; we think it improbable that he will pay
" or accept any of theſe bills."

Dec. 23. Of this date, Meſſ. Gibſon and Balfour wrote the petitioner in theſe words: "Sir, Mr James Scott of this place, having applied to us for
" ſome aſſiſtance in the preſent unſettled ſituation of Scots bills
" in your place; and as he means to remit the money to your
" houſe, to enable you to retire his ſundry engagements in Lon-
" don, we will with the greateſt chearfulneſs comply with his re-
" queſt, on receiving a letter from you, obliging yourſelf to ac-
" cept his bills on you for as large a ſum as he ſhall remit you,
" or we ſhall do it on his account. This we are perſuaded, will
" be much for the honour and intereſt of Mr Scott's friends in
" London; *and as he is now contracting his affairs, and calling in his
" funds, he will be very ſoon out of this dilemma.* Mr Scott ſhowed us
" your letter of the 16th, agreeing to accept two bills he had
" drawn on Annan and Colquhoun to your order, at 60 days date
" from the 12th *per* L. 300 each; if neceſſary for his honour,
" which we have duly noted, and are, *&c.*"

" *P. S.* Meſſrs Annan and Colquhoun, have covered them-
" ſelves greatly in their concerns with M'Culloch and company,
" by arreſtments."

Ebenezer M'Culloch and company, had ſtopt at Edinburgh on the 13th December 1769. The effect which this behoved to have on Annan and Colquhoun, was well known at Edinburgh the 16th; and on the 18th ſaid month, the petitioner being ſuſpicious of Annan and Colquhoun's failure, went to their compting-houſe, and was ſhown the accompt betwixt them and Mr Scott; and from the number and extent of Mr Scott's bills running at that time, the petitioner was pretty much convinced, that he behoved to ſtop next; and therefore, the petitioner reſolved, and

from

from thenceforth positively refuſed to accept any of Mr Scott's bills.

By the 18th December, Annan and Colquhoun ſtopt payment. 1769.
On the 19th James Scott's draughts on them are proteſted for 18. Dec.
not-acceptance, and returned to Edinburgh; and the 25th ſaid 19. Do.
month, James Scott likewiſe ſtopt payment. 25. Do.

Of this date, Meſſrs Gibſon and Balfour applied by petition to 22. Do.
the Sheriff of Edinburgh, craving that James Scott might be examined; and that he might be ordained to deliver up the letter wrote to him by the now petitioner upon the 16th December 1769, that it might lie *in retentis* for behoof of all concerned; and the Sheriff having ordered ſaid letter to be exhibited, it was ſealed up to ly *in retentis* ſubject to the order of Court. And upon an after application by Meſſrs Gibſon and Balfour, the ſeals were, with conſent of the petitioner, removed by the Sheriff.

Meſſrs Gibſon and Balfour thereupon thought proper to commence an action before your Lordſhips againſt the petitioner and James Scott, ſetting furth, that on the 12th December laſt, the ſaid James Scott had drawn two bills of exchange for L. 300, each on Annan and Colquhoun, payable to them the purſuers. Theſe bills were, on the 19th of ſaid month, proteſted for non-acceptance. That ſaid James Scott, having reaſon to expect the diſhonour of theſe bills, had remitted to the petitioner L. 800, deſiring him (in caſe the bills were diſhonoured) to honour and pay the ſame on the drawer's account. That the petitioner, by his letter in anſwer thereto, of date the 16th or 17th ſaid month, acknowledged their remittance, and promiſed to pay ſaid two bills, if acceptance and payment was refuſed by Annan and Colquhoun. That ſaid James Scott refuſed to deliver up ſaid letter to the purſuers, that they might operate their relief thereon; and that the now petitioner had refuſed to perform his promiſe and engagement to honour theſe bills: And the ſummons concludes, that the ſaid James Scott, and the petitioner, ſhould be decerned, conjunctly and ſeverally, not only to exhibit and produce the foreſaid original miſſive letter of the tenor or import above mentioned, or an atteſted copy thereof from the books of the petitioner, but alſo to make payment, conjunctly or ſeverally, to the purſuers of the ſum of L. 600 Sterling, as the contents of the ſaid two bills of exchange and annualrent due thereon, with L. 100

more

more in name of damages, exchange, re-exchange, coſts and expenses.

This action came in courſe before the Lord Coalſton Ordinary, who, upon adviſing mutual memorials, of this date, pronounced the following interlocutor: "The Lord Ordinary having "conſidered the memorials for both parties, finds it proved by "James Scott's letters, of the 12th and 14th of December 1769, "that the bill for L. 800 Sterling on Glynn and company was "tranſmitted to the defender under truſt, that he ſhould deliver "the ſame to Annan and Colquhoun, if they ſhould accept his "bills on them payable to the purſuers, and were ſtill going on; "and if not, that he ſhould credit his accompt with the ſaid bill, "and for his honour accept the ſaid bills drawn on Annan and "Colquhoun payable to the purſuers: Finds it inſtructed by the "defender's letter to Scott, dated the 16th December 1769, that "he did accept and undertake the truſt in terms above men-"tioned, and did thereby become bound, in caſe it ſhould be ne-"ceſſary, to accept the bills due to the purſuers; and therefore, "and in reſpect it is proved by the ſaid letters of the 14th of "December, and the other letters produced, that Scott had no-"tified to the purſuers the orders he had given to the defender, "and that, in caſe of neceſſity, they were to apply to him for "acceptance and payment; finds, that, in theſe circumſtances, "it was not competent to the defender to counteract the orders "of his conſtituent, nor to reſile from the obligation he had "come under by his letter of the 16th of December; and there-"fore repells the defence, and decerns; ſuperſeding extract till "the 15th of November next."

Aug. 10. 1770.

And, upon adviſing a repreſentation and anſwers, his Lordſhip, of this date, adhered; ſuperſeding extract till the 15th of January next.

Dec. 21. 1770.

Of theſe interlocutors the petitioner humbly craves your Lordſhips review.

The grounds upon which the purſuers endeavoured to ſupport their claim, reſolve into this, that the bill of L 800 drawn by Johnſton and Smith upon Glynn and Halifax was tranſmitted to the petitioner for the ſpecial purpoſe of being put into the hands of Annan and Colquhoun, in caſe they did not ſtop payment, in order to enable him to pay the bills drawn in favours of the purſuers

and

and of Meſſrs Sinclair and Seaton; and that in caſe they did ſtop payment, the petitioner was to accept theſe bills himſelf, and to retain the bill on Glynn and Halifax for his relief. That the tranſaction fell therefore to be conſidered as a depoſitation of the bill on Glynn and Halifax, in the hands of the petitioner, upon the foreſaid conditions; and that the petitioner having accepted of the depoſitation, he was bound to comply with the terms of it, and was not intitled to hold the foreſaid ſum on account of any claim the petitioner may have had againſt Mr Scott. And the purſuers were further pleaſed to conſider the foreſaid letter wrote by the petitioner to Mr Scott, of the 16th December, not only as evidence of his having accepted of the depoſitation, but as inferring a promiſe of payment againſt him.

In the *firſt* place, it is an agreed fact, that it was not upon the faith of the letter of the 12th December, wrote by Mr Scott to the petitioner, that the purſuers advanced their money to Mr Scott. Mr Scott's draughts upon Annan and Colquhoun are dated the 12th December 1769; and it is admitted by the purſuers, in the courſe of the proceſs, that they knew nothing of the letter from Mr Scott to the petitioner, upon which they now found their plea earlier than the 13th of December, when they alledge (though without any evidence of the fact) that Mr Scott ſhowed them a copy of the letter in his copy-book of letters.

This being the caſe, the petitioner cannot help conſidering the purſuers as particularly fortunate, if they ſhall recover their money in competition with the petitioner, a moſt onerous creditor, for no leſs than L. 2000 Sterling, in conſequence of two private letters paſſing betwixt James Scott and the petitioner, his correſpondent at London, of which the purſuers were entirely ignorant at the time; and one of which they recovered out of James Scott's hands, upon an application to the Sheriff for that purpoſe, and upon which they have founded the preſent action. It is ſomewhat extraordinary, that a private letter wrote by one perſon to another, in the courſe of their correſpondence, ſhould avail a third party, or afford him any *jus queſitum* or ground of action, when ſuch letter was neither delivered nor intended to be delivered to that third party, but both the letters now founded on by the purſuers, might have been innocently retired or deſtroyed by James Scott and the petitioner.

The petitioner has no occaſion to enter into the queſtion, How far a depoſitary in every caſe is bound to comply with the terms of the depoſitation? or, if under particular circumſtances, it is competent to the depoſitary to retain the depoſits on account of what may be due to himſelf? The petitioner humbly apprehends, that the preſent queſtion falls to be conſidered in a very different light. The petitioner was Mr Scott's ordinary correſpondent at London; he was in uſe to anſwer theſe draughts which he had occaſion to make in the courſe of his dealings and tranſactions, and to impreſs money from time to time into his hands, either for anſwering the draughts to be made, or reimburſing him for draughts already made; and therefore the bill upon Glynn and Halifax, tranſmitted to the petitioner, falls truly to be conſidered as a remittance made by Mr Scott to the petitioner his factor or correſpondent at London, for anſwering the demands made upon the factor by the conſtituent, but at the ſame time pointing out in what ſhape he inclined the money to be applied.

Now the petitioner is humbly adviſed, that when a conſtituent gives private inſtructions to his factor reſpecting the application of the money in his hands, or which, from time to time, was remitted to him, that no *jus crediti* is thereby eſtabliſhed in favours of the particular perſons to whom the conſtituent directs his factor to make the payment. If circumſtances ſhould caſt up which might induce the conſtituent to alter his mind as to the directions he has formerly given reſpecting the application of his money, there is certainly nothing to hinder him to do ſo; and it would not be competent to the creditor or creditors, in whoſe favours he had given his former directions, to force the private letter out of the hands of the factor, and thereupon to rear up an action againſt him for payment of their debts, becauſe he had formerly received orders to that effect, notwithſtanding that theſe orders ſhould have been countermanded by ſubſequent orders or directions.

If any man ſhould deliver to his creditor a draught or order upon his factor, and if that order ſhould be accepted, a valid and an effectual obligation is thereby created in his favours; and which it is not in the power of either the factor or his conſtituent, by any act or deed of theirs, to defeat or diſappoint; and even although not accepted, it would imply an aſſignation of what might

be

be in the factor's hands, and which therefore he behoved to make forthcoming to the person possessed of such order. But where any man, in a private letter to his factor, gives advice or instructions as to the payment of his creditors, there is thereby no *jus quæsitum* in favours of the creditors; but their action for payment does only lye against the constituent, who is the proper debtor; and if any damage does thereby occur to the constituent by the factor's neglecting to comply with the orders and directions he received, he would be intitled to make good the same *actione mandati directa* against the mandator, unless he had some relevant excuse for his conduct. But the petitioner humbly apprehends, that by such private orders or instructions, no effectual *jus crediti* is thereby created in favours of the creditors, but that it is infallibly competent to the person who gave the orders, *rebus integris*, to recal them, and to appoint his money to be applied otherwise.

And as, with submission, it is undoubtedly competent to the mandant to recal the mandate, *rebus integris*, so the petitioner does humbly apprehend, that, under certain circumstances, it is even competent to the mandatar, after having accepted of the mandate, to refuse to comply, and that he would not be compellable, even at the instance of the mandant, to execute or perform the commission he had undertaken.

Thus, where a man, in unsuspected circumstances, desires his friend to pay a sum of money on his account, and the mandatar, though possessed of none of his funds, undertakes the commission, and agrees to advance the money; if the person giving such commission continues in unsuspected circumstances, the person who had accepted of the commission, could not be justified for refusing to do what he had undertaken, upon pretence that he had none of the mandant's funds in his hands: But supposing that the mandant should suddenly become bankrupt before the money is given away, the mandatar could not be bound, either in law or in justice, to part with a single farthing when he had none of the mandant's funds in his hands, and when, by his bankruptcy, he had no chance to be re-imbursed.

This is precisely the present case: Mr Scott makes a remittance of L. 800 Sterling, by means of the bill on Glynn and Halifax, to the petitioner his London correspondent, in order to enable him

so

ſo far to anſwer his demands, and at the ſame time deſires him to pay certain draughts to the amount of L. 800; and though the petitioner was poſſeſſed of none of Mr Scott's money at the time, but on the contrary was creditor to Mr Scott to the amount of L. 2000 Sterling, yet, as, at that period, he had no ſuſpicions of Mr Scott's circumſtances, he does what he had frequently done in former occaſions; and accordingly, in his letter to Mr Scott on the 16th of December, he ſignifies his intention to comply with Mr Scott's requeſt, in accepting Mr Scott's draughts for his honour; but as Mr Scott, before either the draughts were paid or accepted, became notourly bankrupt, whereby the petitioner's re-imburſement was cut off, he, with ſubmiſſion, apprehends, that he was bound, neither in law nor in juſtice, to accept of either of theſe draughts, which he had only agreed to do at a period when he had no ſuſpicion of Mr Scott's circumſtances; but as, by his bankruptcy, *res devenit in alium caſum*, the moſt explicit acceptance of the ſuppoſed mandate, upon the part of the petitioner, could never oblige him to pay any of Mr Scott's creditors, when he had none of his funds in his hands, and when, by his bankruptcy, the petitioner had no chance to be re-imburſed of any advances he might make on Mr Scott's account.

It has been already obſerved, that no *jus crediti* was created in favours of the purſuers by the private letters of correſpondence that paſſed betwixt Mr Scott and the petitioner his factor or correſpondent at London. The private orders which Mr Scott gave to his own correſpondent, reſpecting the purſuers payment, might unqueſtionably have been recalled by him, *rebus integris*; and if ſo, although it were true, that the petitioner had given the moſt explicit aſſurance to Mr Scott, that he would pay the draughts in queſtion, yet he could not be bound to make ſuch payments, when by Mr Scott's bankruptcy he had no chance to be relieved. The petitioner granted no obligation, directly or indirectly, in favours of the purſuer: Any obligation he may be ſuppoſed to have come under was to Mr Scott alone; and as Mr Scott, after his bankruptcy, could not have compelled the petitioner to pay theſe draughts, upon any ſuppoſed promiſe or obligation he might have come under, ſo neither, with ſubmiſſion, can any action lye, either in law or in equity, at the inſtance of the purſuers.

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The petitioner's letter of the 16th December, can be conſidered in no other light than as a reſolution on the part of the petitioner, which, upon an alteration of circumſtances, he was intitled to alter; and the circumſtance of Mr Scott's inſolvency, which afterwards happened, intitled the petitioner to make that alteration. The petitioner's ſuppoſed promiſe to accept theſe bills, falls to be conſidered in the ſame light as if he had promiſed to lend ſo much money to Mr Scott; and in that caſe, it cannot be doubted, that if, before the money was given, Mr Scott became bankrupt, the petitioner would have been at full liberty to refuſe the money, notwithſtanding of ſuch promiſe.

And if the petitioner's letter could produce no effectual obligation againſt him in favours of Mr Scott, in the event that has happened, far leſs can it produce ſuch obligation in favours of the purſuers. The petitioner never meant any thing in their favours: He only meant a favour to Mr Scott; and as it was not upon the faith of either of the letters that the money was advanced by the purſuers, the petitioner, with ſubmiſſion, is at a loſs to diſcover upon what ground the purſuers can rear up a claim upon the private letters of correſpondence that paſſed betwixt Mr Scott and the petitioner, when no ſuch claim would be competent to either of the parties to whom the letters were wrote.

And agreeable thereto, it appears to have been decided 21ſt July 1697, Inglis *contra* Clerk. The caſe there was, one Stonehewer, a merchant in London, being debtor to John Inglis writer to the ſignet, John M'Ghie of Palgowan, and others, ſends L. 200 Sterling to Bailie Clark of Edinburgh, ſignifying, that it was to pay part of Palgowan's bill of exchange; but John Inglis having proteſted Stonehewer's bill for not payment, arreſts the money in Clark's hands. Palgowan, in the competition which afterwards enſued, contended, that the money being ſent to be delivered to him, this ſtated the property thereof in him; and ſo being no more Stonehewer's money, it could not be affected by his creditors arreſtments. John Inglis anſwered, That the money continued to be Stonehewer's; for he might have any time before delivery, altered his reſolution, countermanded the firſt order of giving it to Palgowan, and ordered it for another. The Lords found the *dominium* not tranſmitted till delivery, and therefore preferred Inglis the arreſter. Fountainhall.

Forbes. In like manner, it was determined, 16th January 1706, Lord Roſs *contra* Gray. The caſe there was, that David Roſs, indorſee of a L. 60 bill, drawn by Sutherland of Kinnald upon, and accepted by Mr John Middleton, purſued the accepter, who offered to prove, by the oath of the poſſeſſor of the bill, that he was but Kinnald's truſtee; and by Kinnald's oath, that he had received ſome partial payments. And David Roſs deponed, That he was ordered by Kinnald to fill up his own name in the indorſation when blank, for payment to himſelf of 200 merks; and was ordered by Kinnald to apply the remainder to pay a debt due by Kinnald to Lord Roſs. Gray of Newton, a creditor of Kinnald's, and who had arreſted in the hands of the indorſee and accepter, alledged, that he ought to be preferred, as the money continued to be Kinnald's, notwithſtanding of his orders anent the application in favours of Lord Roſs; becauſe Kinnald could freely alter and countermand that order, at any time before payment. And the Lords found, that the property of the money remained with Kinnald, and was therefore arreſtable by his creditors.

Upon the principles eſtabliſhed by theſe deciſions, it is plain, that there was no *jus quæſitum* in favours of the purſuers by the private orders or directions which Mr Scott gave to the petitioner his own correſpondent, that the property of the money ſtill remained with Mr Scott, ſubject to his after orders, and arreſtable by his creditors. And if the creditors of Mr Scott arreſting in the petitioner's hands would have been preferable to the purſuers, upon the ſuppoſition that the L. 800 in queſtion had been a clear fund in the purſuers hands, the petitioner muſt likeways be preferable in virtue of the right of retention competent to him, on account of the large ſum in which the petitioner ſtood creditor to Mr Scott at the period of his bankruptcy. As a man cannot arreſt in his own hands, it is a clear caſe, that he is equally ſecure in virtue of his right of retention, as he would be by an arreſtment uſed in the hands of any creditor of the common debtors.

It was ſaid for the purſuers, that upon the 13th of December, they having applied to Mr Scott, he repreſented to them, that they might reſt ſatisfied without taking any ſteps; for that he had provided for the honour of their draughts by the depoſits of a ſufficient ſum of money in the hands of the petitioner; and in evidence thereof, he read to them from his letter-book a copy of the

letter

letter which he had wrote the day preceeding to the petitioner: That after this it was not in the power of Mr Scott to apply that sum to any other purpose; and that as the pursuers rested satisfied on this security, and in the belief that the petitioner would duly honour their draughts, without taking any step against Mr Scott for securing the sum due to them, and which otherways they could easily have done before his bankruptcy was made public, the pursuers cannot in justice now be deprived of that sum.

But as the petitioner does humbly apprehend, that the private letters of correspondence betwixt Mr Scott and the petitioner, did create no *jus quæsitum* in favours of the pursuers, and was not a legal transfer of the debts; so, however Mr Scot might have been to blame in applying the money to any other purpose, if the fact were true, that Mr Scott had shown the letter upon the 13th of December, and assured them that they might rely upon the same for their payment, (of which there is no other evidence than the pursuers own assertion) yet if Mr Scott should have taken it upon him to make a proper transfer of the debt, such assignee would have had a good and preferable right in competition with the pursuers. His creditors arresters, would likewise have been preferable; and if so, by the same rule the petitioner, who is a most onerous creditor, to the amount of L. 2000 Sterling, must be preferable, in virtue of his right of retention.

At the same time, it is altogether affected in the pursuers to pretend that they have been deceived, and led to rely upon the foresaid security, in the belief that they would be paid by the petitioner, without proceeding to any step of diligence for operating their payments. It has been already observed, that it was not upon the faith of any of the foresaid letters that the money was advanced by the pursuers to Mr Scott; and as it was not upon the faith thereof the money was advanced, so neither can they seriously pretend to say, that it was upon the faith thereof that they did not proceed to secure themselves by legal diligence. On the contrary, it clearly appears from their own letters that they would not have proceeded to diligence, altho' they had known nothing of the letters that passed betwixt Mr Scott and the petitioner. Your Lordships will observe, from the letters above recited, and particularly the letter of 19th December 1769, from Biggar and Hamilton to the pursuers, and by another from Bogle

and

and Scot to them, of the ſame date, that they were thereby fully apprized, that the petitioner abſolutely refuſed to pay, or have any concern with the draughts in favours of the purſuers. Both theſe letters, by the courſe of poſt, arrived at Edinburgh, as will appear by the poſt-office books, 1-4th after two o'clock of the afternoon of Saturday the 23d December; and yet it appears from the letter above recited, which they wrote to the petitioner by the poſt that evening, that they had not the ſmalleſt apprehenſion that they run the ſmalleſt riſque of loſing any thing by Mr Scott. They therein write the petitioner, that Mr Scott had applied to them for ſome aſſiſtance in the then unſettled ſituation of Scotch bills, (which was owing to M'Culloch's bankruptcy) and they therein endeavour to perſuade the petitioner that he was perfectly ſafe to accept Mr Scott's bills upon him. They repreſent to the petitioner, that as Mr Scott was now contracting his affairs, and calling in his funds, he would be very ſoon out of the dilemma he was then in. The purſuers are gentlemen of honour; and as nobody will imagine, that they thereby meant to perſuade the petitioner to lend his credit to a man in a tottering condition, in the view of recovering their own payment out of the money he might advance to Mr Scott; ſo it is plain, that they, even at that period, conſidered Mr Scott as ſound at the bottom, and that none of his creditors run any riſque of loſing by him. As the whole ſtile of the foreſaid letter is abſolutely inconſiſtent with the idea of the neceſſity of legal diligence to ſecure their payment, ſo it is extremely clear, that the purſuers would not have taken any ſtep of diligence againſt Mr Scott, at leaſt before the 23d of December, the date of the foreſaid letter, even altho' they had all along remained intirely ignorant of the letters that paſſed betwixt Mr Scott and the petitioner; and they cannot ſay, that after the 23d, they believed, or had reaſon to believe, that the petitioner would accept of the draughts in their favours, when they received pointed information from their own correſpondents, upon the arrival of the poſt that day, that the petitioner had poſitively refuſed to have any concern with theſe draughts.

It was ſaid upon the part of the purſuers, that where a perſon who is debtor in ſundry different debts, makes a payment expreſsly to account of any particular debt, it is not in the power of the creditor afterwards to apply that payment to any other debt

that

that might be due to him; and a case lately decided by your Lordships, viz. the creditors of Dunlop against Coutts and Co. was appealed to.

The petitioner has no occasion to contravert the general proposition; for when a debtor gives a sum to his creditor expressly in payment of a particular debt, and that sum is accepted of by the creditor, the debt *eo ipso*, is thereby extinguished; and therefore, upon any after-emergency, it cannot afterwards be reared up, and the payment made to apply to a quite different debt; and this was all that was found by the foresaid decision, but that does not in the least resemble the present case. The remittance of the L. 800 by the bill upon Glynn and Halifax, was not a payment, but a remittance made by Mr Scott to his factor and correspondent at London, with an instruction as to the manner in which he inclined his factor should apply that money, by which no *jus quæsitum* was established in favours of any third party; but the money did, notwithstanding thereof, still remain the property of Mr Scott, and of consequence was attachable by his creditors; and therefore, altho' the petitioner agreed to make the payment in the manner directed, when Mr Scott was in credit, and carrying on business, yet he could not be compelled, either by Mr Scott or his creditors, to make that payment after Mr Scott had become bankrupt, when, in fact, the petitioner had none of his money in his hands, but was creditor to him in a large sum; and consequently, if he had made the payment he had no chance to be again reimbursed.

The pursuers appealed to the decision 9th February 1759, Andrew Stalker against Andrew Aiton. The case there was, John Trottor in Jamaica, in July 1754, sent a cargo of sugars consigned to Andrew Aiton at Glasgow, and to Mitchell at Leith. He inclosed the invoice and bills of loading in a letter to Aiton, and desired him when he received the proceeds, to discharge certain bills and accompts, conform to a list subjoined to the letter, in which list Andrew Stalker was one. Fac. Coll.

Before the arrival of the sugars, Mr Stalker, in October 1754, arrested in the hands of Aiton, and after the arrival of the sugars, Mr Aiton, in February 1755, made out an account of the proceeds of the cargo, and allotted to each of the creditors a share thereof corresponding to their debts.

All the creditors agreed to accept of the dividend, except Stalker, and Aiton granted an obligation to the other creditors to pay them their ſhare of it; but before Mr Aiton had paid the creditors Mr Stalker executed another arreſtment in his hands, and on both arreſtments raiſed a proceſs of forthcoming, and a competition having thereupon enſued betwixt Mr Stalker and Mr Aiton, the truſtee for the other creditors, the Lord Ordinary found, "That in October 1754, the date of the purſuer's firſt arreſtment, Andrew Aiton "had no ſuch poſſeſſion of the goods as to make the arreſtments "in his hands a habile diligence for affecting the ſame; and "with reſpect to the ſecond arreſtment laid on in Mr Aiton's "hands after he became bound to the creditors to divide the proceeds of the cargo amongſt them: Found that Mr Aiton was not "interpelled by the ſaid arreſtment from making payment to the "creditors in purſuance of his obligation: And the Lords on "adviſing a reclaiming petition and anſwers, adhered to the interlocutor of the Lord Ordinary."

There is evidently no ſimilarity between that caſe and the preſent; for it is plain that after Mr Aiton had granted an obligation to the ſeveral creditors for their reſpective ſhares of the proceeds of the goods, there was thereby a *jus quaeſitum* to theſe creditors, which it was not in the power either of John Trotter the common debtor, or of his creditors by their diligence, to fruſtrate and diſappoint; whereas it has been ſhown that there was no *jus quaeſitum* to the purſuers by the private letters of correſpondence betwixt Mr Scott and the petitioner, and therefore the petitioner could not be obliged to pay the draughts in favour of the purſuers after Mr Scott's bankruptcy, when the petitioner had none of Mr Scott's funds in his hands.

The purſuers mentioned another deciſion, viz. Stewart *contra* Biſſet, lately determined by the court. This deciſion is not collected, and therefore the petitioner cannot take it upon him to ſay what circumſtances may have there occurred which might have influenced the judgments; but taking it as ſtated by the purſuers themſelves, the petitioner apprehends, that it is by no means ſimilar to the preſent caſe.

The caſe, as ſtated by the purſuers, ſtands thus: John M'Donald merchant in Inverneſs accepted a bill for L.18 : 10 : 6, payable three days after date to Donald M'Bain; and M'Bain having indorſed

dorſed the bill to Coutts and Co. it was again indorſed by them to Andrew Stewart writer to the ſignet.

Sometime after this, the bill became due, and Mr Stewart wrote to James Cumming his correſpondent at Inverneſs, to demand the payment of it, and ſent him a horning to be executed in caſe the payment ſhould be refuſed or delayed: Cumming accordingly made the demand in July 1763, when he was told by M'Donald the accepter, that he had ſent the contents of this acceptance ſometime before, to one Biſſet his correſpondent at Perth, to be delivered by him to the holder of the bill.

Mr Stewart truſting to this, and in daily expectation of receiving the money from Biſſet, did not proceed in diligence againſt M'Donald, but not hearing from Biſſet, Mr Stewart wrote to him, deſiring that the foreſaid ſum of L. 18 might be ſent over here.

Biſſet, upon being applied to, acknowledged that M'Donald, upon a ſettlement between them in May 1763, had delivered to him the ſum of L. 9 Sterling for the ſame purpoſe of retiring the foreſaid acceptance, and that he afterwards remitted him the like ſum of L. 9 for the ſame purpoſe. Theſe facts he acknowledged, but nevertheleſs refuſed to deliver the money to Mr Stewart on pretence of applying it to certain debts due by M'Donald to him, M'Donald having failed in his circumſtances.

Mr Stewart brought an action for this ſum before your Lordſhips againſt Biſſet, in which action Biſſet was aſſoilzied by the Lord Ordinary; but upon adviſing a reclaiming petition and anſwers, your Lordſhips altered the Lord Ordinary's interlocutor, and found Biſſet liable.

This is the ſtate of the caſe given by the purſuers themſelves, and the petitioner does humbly apprehend that it is clearly very different from the preſent. In that caſe, upon a clearance and ſettlement betwixt M'Donald and Biſſet, M'Donald delivered him the ſum of L. 9 Sterling, and afterwards ſent L. 9 more to him as a hand for the ſpecial purpoſe of conveying the money to the creditor in that bill. That being the caſe, it was Biſſet's duty to have given, or ſent the money *quam primum* to the creditor; and it was a wrong in him to with-hold it, and therefore he could never be allowed afterwards to retain it upon pretence of any ſum in which M'Donald might afterwards become indebted to him.

But

But that is extremely different from the preſent caſe, where the ſum in queſtion was truly a remittance made by Mr Scott to the petitioner, his ordinary factor and correſpondent at London, and with which ſum Mr Scott in his letter of 14th December 1769, deſires the petitioner to *credit his account*; and altho' Mr Scott in his private letters of correſpondence deſires the petitioner to pay and retire particular draughts, and although the petitioner, not ſuſpecting Mr Scott's circumſtances at the time, denotes his intention and reſolution of making theſe payments accordingly, yet as no *jus quaeſitum* in favours of the petitioner could be eſtabliſhed by private letters of correſpondence paſſing betwixt Mr Scott and his correſpondent, the petitioner, with ſubmiſſion, cannot be bound either in law or in juſtice, after Mr Scott's bankruptcy, to make theſe payments, when he had none of his conſtituent's funds in his hands, and when he had no chance of being reimburſed if he paid them out of his own money. Nor have the purſuers any juſt reaſon to complain that they do not receive their payment from the petitioner, when they have admitted, that it was not upon the faith of theſe private letters of correſpondence that they advanced one penny to Mr Scott.

May it therefore pleaſe your Lordſhips to alter the foreſaid interlocutors of the Lord Ordinary, and to aſſoilzie the petitioner from the preſent action.

According to Juſtice, *&c.*

RO. M'QUEEN.